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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ASIA AWAD, Plaintiff, v. LIBERTY MUTUAL FIRE INSURANCE COMPANY, RAAD KHALAF and DOES 1 – 30, inclusive, Defendants.	CASE NO.: 08 CV 0696 JM(AJB) SDSC Case No. 37-2008-00062594-CU-IC-EC **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DROP RAAD KAHLAF AS A SHAM DEFENDANT PURSUANT TO F.R.C.P. RULE 21** **DATE: 5-23-08** **TIME: 1:30 PM** **COURTROOM: 16**

1. RAAD KHALAF WAS NOT A "DUAL AGENT."

Plaintiff Asia Awad ("AWAD") seeks to avoid this court's jurisdiction by improperly joining Raad Khalaf ("KHALAF") as a defendant in this matter. AWAD argues that the pleadings establish that KHALAF was a "dual agent" in that he owed duties to both Liberty Mutual Fire Insurance Company ("LIBERTY") and AWAD. However, AWAD's arguments miss the mark. AWAD, while citing to the case of *Mercado v. Allstate*, 340 F.3d 824 (9th Cir. 2003), defeats her own argument. *Mercado* provides that an employee acts as a "dual agent" by assuming special duties for the

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benefit of the insured beyond those required by her principal. (*Mercado v. Allstate*, *supra*, 340 F.3d at 826.) In order to establish that KHALAF was a dual agent, AWAD must plead (and prove) facts that KHALAF agreed with AWAD to do more than simply procure an insurance policy. In fact, AWAD has plead that KHALAF did, in fact, successfully procure the jewelry floater. This is evidenced by the declarations page of the policy, attached as Exhibit "A" to the Complaint. Thus, KHALAF did his job as an agent.

Under California law, the "dual agent" theory requires that the insurance agent act on behalf of the insured in a manner beyond his or her capacity as an agent for the insurer. An insurance agent cannot be a "dual agent" unless he or she is either an independent broker or has had a long-term, special relationship with the insured. (*Good v. Prudential*, 5 F.Supp. 804 (N.D. Cal. 1998).) Here, AWAD has not alleged that KHALAF was a independent broker or had a "long-term, special relationship" with her. In fact, AWAD's complaint alleges that KHALAF was an employee of LIBERTY:

> "That at all times herein mentioned, defendants, and each of them, were the agents and employees of each of the remaining defendants, and were at all times acting within the purpose and scope of said agency and employment, and each defendant has ratified and approved the acts of his agent."

(*See*, Complaint, 2:9-12.)

As was the case in *Good*, again, cited by AWAD, this allegation defeats the dual agent theory.

In viewing a complaint, the court need not accept as true conclusory allegations or legal characterizations. Nor need the court not accept unreasonable inferences or unwarranted deductions of fact. (*In re Delorean Motor Co.*, 991 F2d 1236, 1240 (6th Cir. 1993); *Taylor v. F.D.I.C.,* 132 F3d 753, 762 (D.C. Cir. 1997); *Transphase Systems, Inc. v. Southern Calif. Edison Co.*, 839 F.Supp. 711, 718 (CD CA 1993).) The court may also disregard those allegations in the complaint that are contrary to facts that are established by exhibits attached to the complaint. (*Durning v. First Boston Corp.*, 815 F2d 1265 (9th Cir. 1987).) The policy attached as Exhibit "A" to the AWAD's complaint establishes that KHALAF is a LIBERTY agent and not an independent broker or AWAD's "agent," despite AWAD's conclusory allegations of agency.

2. AWAD HAS NOT PLEAD AN INDEPENDENT TORT AGAINST KHALAF.

AWAD contends that due to the "special relationship" between she and KHALAF, KHALAF owes a heightened duty to AWAD not to have advised LIBERTY of his concerns about the application for the jewelry floater. According to the complaint, these "concerns" included the fact that KHALAF did not believe that AWAD actually had the jewelry that she sought to insure. (Complaint, ¶18.) AWAD alleges that KHALAF should have advised her of the fact he believed that she might be committing a fraud on LIBERTY so that she might have gone to another agent for the coverage. (Complaint, ¶18.) It is this failure of KHALAF that AWAD contends is negligence. Taken to its logical conclusion, AWAD argues that KHALAF breached a duty to her by either: (1) filing to keeping quiet and not assisting her in committing fraud; or (2) advising her that he thought she was committing a fraud so that she could go to another agent. In either event, this is not a breach of any duty that KHALAF would owe to AWAD in the course and scope of his duties as a LIBERTY agent.

AWAD's citation to *McNeill v. State Farm*, 116 Cal.App.4th 597 (1994) is inapposite as in that case, the allegations against the insurer's agent included intentional misrepresentation and fraud. There, the court held that those specific intentional torts could be alleged against an agent. Also, the court found that complaint alleged a long-term relationship between the insured and the agent which supported an exception to the *Good* case on its own terms. (*McNeill v. State Farm*, *supra*, 116 Cal.App.4th at 603.) Here, there are no factual allegations of fraud or misrepresentation, no factual allegations of a long-term relationship between AWAD and KHALAF, nor any factual allegations of any other special relationship which would support an independent duty of KHALAF to AWAD.

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3. CONCLUSION

Based on the foregoing, KHALAF is an improper defendant named solely to defeat diversity jurisdiction in this action and should be dismissed.

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